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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 109

CHARLES LALOR BURDICK and CHEMICAL BANK & TRUST COMPANY, Trustees of the Last Will and Testament of Willard A. Lalor, deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR THE PETITIONERS

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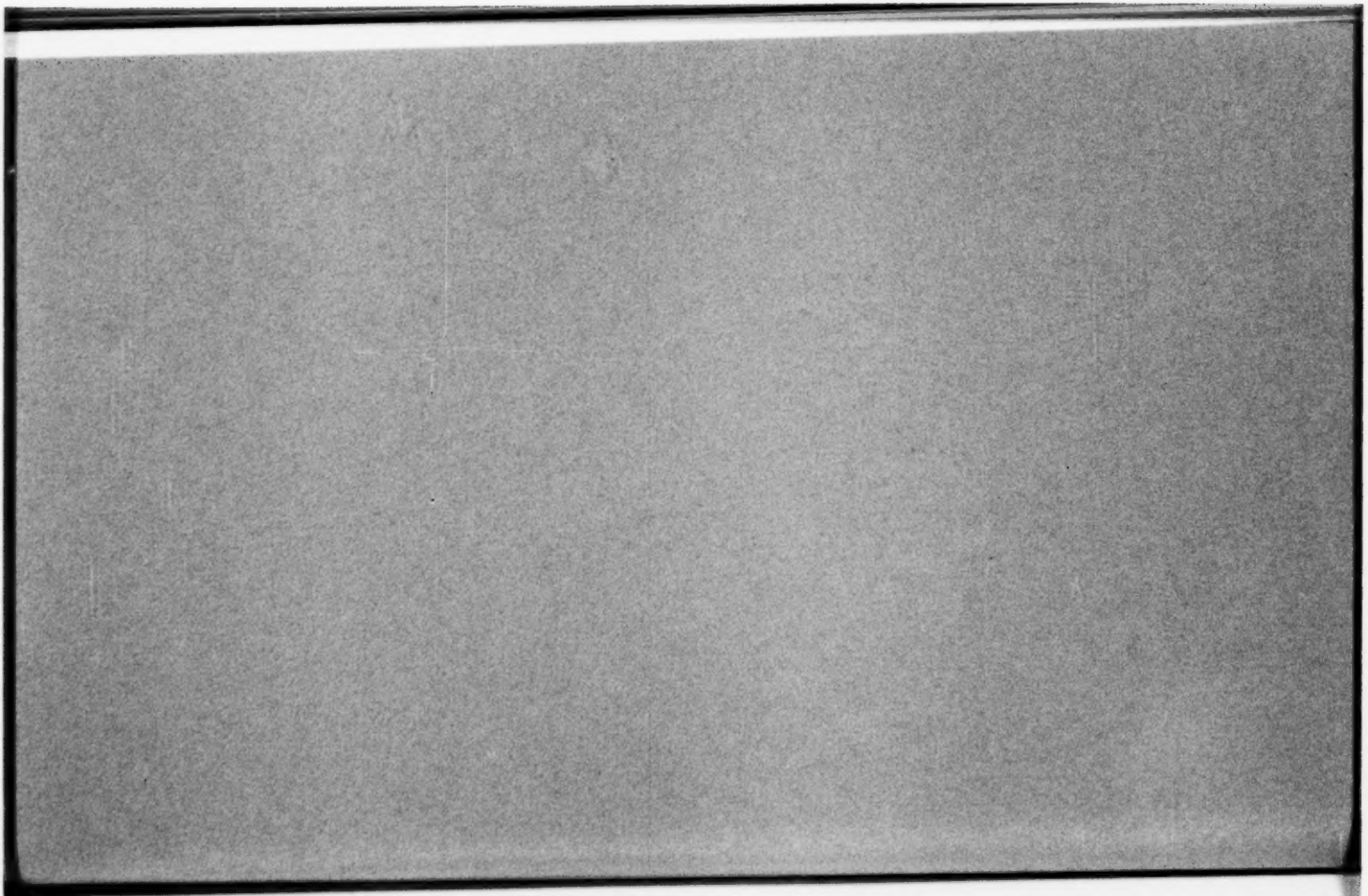

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I.

The inadvertent error on page 5 of the Respondent's brief as to the Petitioners' statement respecting *Levey* v. *Smith*.

The respondent's opposing brief at page 5 unfortunately though inadvertently misconstrues the petitioners' stated position in respect of *Levey* v. *Smith* (C. C. A. 7th), 103 Fed. (2d) 643, c. d. 308 U. S. 578. The respondent mistakenly states (p. 5):

> "Petitioners say that because the deduction in that case turned upon the activities of the lodge the deduction here should turn upon the activities of the Lalor Foundation, Inc., which was admittedly organized exclusively for scientific and educational purposes."

Petitioners did not say this.

The *Levey* case, which the petitioners briefly discuss on pages 14 to 15 of their petition-brief, is there referred to as showing that the question of power to use a fund for and divert it to a non-charitable use, under Section 303(a)(3) of the Revenue Act of 1926, as amended, and under the second paragraph of Article 47 of Regulations 80, is a question of power in the *transferee of the fund,* and not, as the Court below erroneously construed it, a question of power in the *holder of a power of designation* or appointment.

II.

The cases relied upon on page 6 of the Respondent's brief are clearly distinguishable, and the statement there made in connection with their citation is submitted to be inaccurate.

The three cases cited on page 6 of the respondent's opposing brief are submitted all to be clearly distinguishable from the present case, and it is submitted further that the statement immediately preceding such three citations is inaccurate.

As shown in Point III of petitioners' brief (petition—brief, pp. 20 *et seq.*), the legacy should not have been held an uncertain gift defeating deductibility.

In *Knoernschild* v. *Commissioner* (C. C. A. 7th), 97 Fed. (2d) 213, there was a testamentary gift to a daughter for life, and on her death over to charities, but the daughter was given power in her life to direct the trustees to pay out any part of the fund to provide for her relatives. Had a charitable deduction been allowed, at any time thereafter during her life the trustees, on the daughter's direction, could have diverted the fund to such private use notwithstanding such deduction.

In *Mississippi Valley Trust Co.* v. *Commissioner* (C. C. A. 8th), 72 Fed. (2d) 197, c. d. 293 U. S. 604, the testator's will stated he made no charitable bequests, but preferred to have his sons make charitable donations in their sole discretion. Obviously there was no testamentary charitable gift, and hence no case for a charitable deduction.

In *Davison* v. *Commissioner* (C. C. A. 2d), 81 Fed. (2d) 16, there was a testamentary trust for a wife's life, with a gift over on her death to her private appointees, and an alternative gift over, by condition subsequent in the event of her failure to appoint, to charities. Had deduction been allowed, it would have been in theory as for a charitable legacy, but in actuality for a private legacy which could have become charitable only by operation of a condition subsequent at the life tenant's death, perhaps many years later.

It is clear that in such cases charitable deductions should not be allowed.

In the present case, however, the situation is wholly different. Here there is an actual charitable legacy, and the theoretical possibility of its defeat by condition subsequent (a) was limited to a brief period of one year,

(b) was in fact remote under the particular circumstances disclosed, and (c) was wholly precluded by a designation which related back to the testator's death.

The charitable legatee, indeed, had actually received the legacy before the Commissioner asserted its taxability. Even then there was left no possibility of its becoming non-charitable.

To deny deductibility to such a charitable legacy is believed to be clearly erroneous.

This case thus presents an important issue of liberal public policy which this Court should pass upon and clarify, quite aside from the conflict disclosed in respect of Article 47 and more particularly the second paragraph thereof, which the Court below erroneously held to be the controlling factor in the case.

The petition for writ of certiorari should be granted.

Dated, New York, N. Y., July 1, 1941.

Respectfully submitted,

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